Supreme Court, U. S.
FILED
SEP 13 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-398

FORTUNA CORPORATION,
Petitioner,

versus

EDDIE WILKERSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES F. HULSE
Attorney for Petitioners
OF COUNSEL:
SCOTT, HULSE, MARSHALL
& FEUILLE
11th Floor El Paso National
Bank Building
El Paso, Texas 79901

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

TABLE OF CONTENTS

	Page
JURISDICTION	1
QUESTIONS PRESENTED	2
THE LAW INVOLVED	3
THE REQUIREMENT OF DUE PROCESS	3
THE REQUIREMENTS OF THE TEXAS "LONG-ARM" STATUTE	6
STATEMENT	9
RESPONDENT'S PLEADINGS ALLEGE A CAUSE OF ACTION ARISING IN NEW MEXICO	9
THE RECORD SHOWS RESPONDENT'S CAUSE OF ACTION AROSE IN NEW MEXICO	11
THE COURT OF APPEALS OPINION BASICALLY HOLDS THE LOCATION OF PETITIONER'S SUNLAND PARK RACETRACK IS NEW MEXICO, BUT NEAR EL PASO, TEXAS AND ITS ADVERTISING IN EL PASO, TEXAS CONFERS JURISDICTION ON COURTS IN TEXAS	12
REASONS WHY THE WRIT SHOULD BE GRANTED	16
CONCLUSION	21
CERTIFICATE OF SERVICE	21
APPENDIX A — Opinion of U. S. Court of Appeals, 5th Cir., dated June 24, 1977	1a

TABLE OF CONTENTS (Continued)

Page

APPENDIX B — Order Denying Petition for Rehearing, U. S. Court of Appeals, 5th Cir., dated July 26, 1977 ..... 11a

APPENDIX C — Article 2031(b) *Tex. Rev. Civ. Stat.* 12a

APPENDIX D — *U-Anchor Advertising, Inc. v. N. H. Burt*, ___ S.W.2d ___, 20 Tex. Sup. Ct. J. 435 (7-13-1977) 16a

TABLE OF AUTHORITIES

Cases:

Green v. Chicago, Burlington & Quincy Ry., 205 U.S. 530, 533-534, 51 L.Ed. 916 6

Hanson v. Denckla, 357 U.S. 235, 2 L.Ed. 1283 3,5,17,19

International Shoe Co. v. Washington, 326 U.S. 310, 90 L.Ed. 95 3,4,5

McInnes v. Fountainbleau Hotel Corp., 257 F.2d 832, 834, (2nd Cir. 1958) 6

McGee v. International Life Ins. Co., 355 U.S. 220, 2 L.Ed.2d 223 3,4,5

National Geographic Society v. California Board of Equalization, ___ U.S. ___, 97 S.Ct. 1386, 50 L.Ed.2d 631 (1977) 6,19

O'Brien v. Lanpar Co., (Tex. Sup.) 399 S.W.2d 340 (1966) 8,9,14,15,20

Pennoyer v. Neff, 95 U.S. 715, 24 L.Ed. 565 3,4

Sun-X International Co. v. Witt, 413 S.W.2d 761 at 765 17

TABLE OF AUTHORITIES (Continued)

Page

Turner v. Jack Tar Grand Bahama, Ltd., 353 F.2d 954 (1965) 6

Tyee Construction Co. v. Dulien Steel Products, Inc., 62 Wash.2d 106, 381 P.2d 245, 251 (1963) 8

U-Anchor Advertising, Inc. v. N. H. Burt, ___ S.W.2d ___, 20 Tex. Sup. Ct. J. 435 (7-13-1977) 8,15,20

Other Authorities:

Art. 2031b, *Tex. Rev. Civ. Stat.* 4,6,8,9,12,14,20

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.

FORTUNA CORPORATION,
Petitioner,

versus

EDDIE WILKERSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner-Defendant prays that a Writ of Certiorari issue to review judgments of the United States Court of Appeals for the Fifth Circuit, said Court's opinions and judgments being dated June 24, 1977, the Petition for Rehearing filed by Petitioner on July 8, 1977, having been denied by the Court of Appeals on July 26, 1977.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made final by the decision rendered on June 24, 1977, and Petitioner's Petition for Rehearing

was denied by the Court on July 26, 1977. The Order denying said Petition for Rehearing is appended to this Petition in Appendix B infra p. 11a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and Rule 19.1(b), Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

(1) Whether the judgment of the Court of Appeals decided an important question of federal law in a way that is in conflict with applicable decisions of this Court, to-wit, whether Petitioner's right to due process of law under the Constitution of the United States is violated by holding a United States District Court in Texas had jurisdiction over a nonresident foreign corporation in a diversity case in connection with a cause of action in personam, which arose in New Mexico?

(2) Whether the judgment of the Court of Appeals decided an important state question, in a diversity case, in a way that conflicts with applicable state law, to-wit, whether the holding of the Court of Appeals with respect to jurisdiction of a United States District Court in Texas, service of process having been made under the Texas "Long-Arm" Statute, conflicts with applicable state law?

(3) Whether the judgment of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, to-wit, whether Petitioner's (a New Mexico corporation) advertising in El Paso, Texas, coupled with the location of a place of business of Petitioner in New Mexico, but near El Paso, Texas, is sufficient to sustain jurisdiction in a Court in El Paso, Texas over a cause of action in personam arising in New Mexico, and not arising out of any action by Petitioner in Texas.

THE LAW INVOLVED

The reason urged by Petitioner for reversing the Court below is (1) that its holding decides a federal question in a way that conflicts with applicable decisions of this Court, namely, that a nonresident foreign corporation is subject to being sued in Texas, in personam, on substituted service, on a cause of action arising in New Mexico, and basing such holding, in substantial part, on the fact that Petitioner has a place of business in New Mexico *adjacent to Texas*, advertises in Texas and draws some business from Texas customers, and (2) it decides the applicability of the Texas "Long-Arm" Statute in a way that conflicts with applicable state law.

The Requirement Of Due Process

The law basically is the due process clause of the Fourteenth Amendment to the Constitution of the United States, and the decisions of the Court in *Pennoyer v. Neff*, 95 U.S. 715, 24 L.Ed. 565; *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95; *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L.Ed.2d 223; and *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed. 1283.

This is a diversity case, and the United States District Court at El Paso, Texas, would have jurisdiction over Petitioner, in personam, under the Texas "Long-

Arm" Statute, Art. 2031b, *Tex. Rev. Civ. Stat.*, only if a state court in Texas would have had jurisdiction.

Under *Pennoyer v. Neff, supra*, a state court's jurisdiction is restricted by the territorial limits of the state, and it cannot exercise jurisdiction over persons without its territory; and this Court has never held that a state court can exercise jurisdiction over a foreign corporation, wholly or partly on the ground that it owns and operates a business adjacent to the state of the forum. *International Shoe Co. v. Washington, supra*, held that the shoe company, which had a force of salesmen in the forum state who solicited and obtained orders, using a line of samples supplied by the company, and displayed in rooms paid for by the company, and which shipped merchandise into the state, could be sued in the state courts for contributions payable to the state unemployment compensation fund. The holding was that defendant must have certain minimum contacts with the state that the maintenance of the suit does not offend traditional notions of fair play and substantial justice, coupled with the statement to the effect that its activities in the state "may give rise to obligations, *and so far as those obligations arise out of or are connected within the state,*" it was not undue to require defendant to respond to a suit based on those obligations. The holding is thus limited to causes of action arising out of defendant's activities in the state.

McGee v. International Life Ins. Co., 355 U.S. 220, 2 L.Ed.2d 223 held plaintiff could sue a nonresident foreign corporation on a cause of action arising out of nonpayment of a life insurance policy which was delivered in the forum state, premiums paid by mail

from the forum state, and insured lived and died there. The holding was that the suit was based on a contract which had substantial connection with the state of the forum.

Hanson v. Denckla, 357 U.S. 235, 2 L.Ed.2d 223 was decided a few months after the *McGee* decision, and after referring to *McGee* having noted a trend of expanding personal jurisdiction over a nonresident defendant, this Court stated it is a mistake to assume this trend heralds the eventual demise of all restrictions on personal jurisdiction of state courts, and held the Florida courts had no jurisdiction of a resident's trust situated in Delaware.

In both the *International Shoe Company* and the *International Life Insurance Company* cases the cause of action arose out of acts by defendant (or in the latter case by its predecessor in interest) in the forum state. *Hanson v. Denckla* indicates this Court's decisions do not go further than the actual holdings in the *Shoe Company* and the *Insurance Company* cases. And that, undoubtedly, is why the Texas "Long-Arm" statute requires and the Texas courts hold the cause of action must arise out of acts purposefully done in Texas by the defendant. This requirement is not met in this case, as the cause of action here arises wholly out of acts in New Mexico. The Court of Appeals, in effect, by-passed this requirement by saying, "Fortuna's broad-based doing of its racetrack business in Texas through location [which is in New Mexico], solicitation of customers [advertising], and dealing with Texas-raised and -trained horses and trainers [all done in New Mexico] gave rise to the cause of action asserted here." The important questions of law in this

case are, can the Court of Appeals override the Texas statute and Texas court decisions by thus holding the cause of action arises out of the totality of everything done by Petitioner, where, of the things referred to in the above quotation, only the advertising was done in Texas? The holding in this case conflicts with the Fifth Circuit's previous holding in *Turner v. Jack Tar Grand Bahama, Ltd.*, 353 F.2d 954 (1965), where it was held that the residence of officers and directors in Texas, together with the holding of conferences in the state regarding Appellee's business operation, and selecting and taking reservations for the Grand Bahama Hotel, do not constitute a sufficient "plus" to prevent application of the "rule" that solicitation alone is an insufficient basis for *in personam* jurisdiction, citing *Green v. Chicago, Burlington & Quincy Ry.*, 205 U.S. 530, 533-534, 51 L.Ed. 916; *McInnes v. Fountainbleau Hotel Corp.*, 257 F.2d 832, 834 (2nd Cir. 1958).

National Geographic Society v. California Board of Equalization, ___ U.S. ___, 97 S.Ct. 1386, 50 L.Ed.2d 631 (1977) indicates the difference between the decisions of this Honorable Court, and the instant case, for in the *National Geographic Society*, case it was held, and stated, that the "nexus" between the Society and the State of California was its maintaining of two offices in California and the activities at such offices, whereas in the instant case Petitioner has no office in Texas.

The Requirements Of The Texas "Long-Arm" Statute

Art. 2031b, *Tex. Rev. Civ. Stat.* is the "Long-Arm" Statute. See Appendix C, infra p. 12a. Service of

process in this case, if sustainable at all, has to be sustained under Secs. 3 and 4 of said Statute. Sec. 3 provides that any foreign corporation that engages in business in this state and does not maintain a place of regular business in this state or a designated agent upon whom service may be made *upon causes of action arising out of such business done in this state*, the act or acts of engaging in such business within this state shall be deemed equivalent to the appointment of such foreign corporation of the Secretary of State of Texas as agent upon whom service of process may be made *in any action, suit or proceedings arising out of such business done in this state.*

It will be noted that Sec. 3 is limited to making substituted service on a foreign corporation only where it engages in business in this state, and the action, suit or proceedings arise out of such business done in this state.

Sec. 4 of said Statute defines doing business in this state, referring first to entering into contracts, which we do not have in this case, and states it may also exist by the committing of any tort in whole or in part in this state.

Your Petitioner is alleged to have received at its office in New Mexico, Respondent's application for stalls, which application Petitioner, at its office in New Mexico did not grant. Respondent appealed from such action by Petitioner to the New Mexico Racing Commission, and which Commission declined to rule in favor of Respondent. Petitioner is therefore alleged to have committed a tort, and under said facts, the alleged tort, if any, was done by acts of Petitioner wholly in New Mexico, and not in Texas.

The requirements of a "long-arm" statute are discussed in the leading case of *O'Brien v. Lanpar Co.*, (Tex. Sup.) 399 S.W.2d 340 (1966) involving the validity of the judgment of a Federal District Court in Illinois against a Texas corporation growing out of a contract made and performed in Illinois. Service in the Illinois case was made under the Illinois "Long-Arm" Statute, which is similar to Art. 2031b, *Tex. Rev. Civ. Stat.*, and the Supreme Court of Texas quoted with approval from *Tyee Construction Co. v. Dulien Steel Products, Inc.*, 62 Wash.2d 106, 381 P.2d 245, 251 (1963) that there are three basic factors which should coincide if jurisdiction over a nonresident corporation is entertained, namely, (1) the nonresident corporation must purposefully do some act or consummate some business in the forum state; (2) *the cause of action must arise from, or be connected with, such act or* transaction (emphasis added); and (3) the assumption of jurisdiction must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

Jurisdiction of Texas Courts under the Texas "Long-Arm" Statute was the issue in the recent case of *U-Anchor Advertising, Inc. v. N. H. Burt*, ____ S.W.2d ____, decided by the Supreme Court of Texas on July 13, 1977. (Copy attached, App. D). This case involved a contract made in Oklahoma concerning signs to be erected in Oklahoma, defendant agreeing to make payments therefor to plaintiff in Texas, and made periodic payments of the consideration by mail from

Oklahoma to defendant in Texas. The opinion quotes part of Art. 2031b, *Tex. Rev. Civ. Stat.*, including Sec. 3, which we have substantially set out above, and which is Appendix C to this Petition. The Court, citing *O'Brien v. Lanpar Co., supra*, repeated the three basic elements that must exist to sustain jurisdiction over a nonresident defendant, being the identical statement set out in the *O'Brien* case, and which we have set out above under our citation of that case. We repeat, in order to emphasize, the first two of said elements, namely, (1) the . . . foreign corporation must purposefully do some act or consummate some transaction in the forum state, and (2) *the cause of action must arise from, or be connected with, such act or transaction.*

STATEMENT

This action involves the question of jurisdiction of the United States District Court, Western District of Texas, El Paso Division, over Petitioner, a New Mexico corporation which operates a racetrack at Sunland Park, New Mexico. The action arises out of Petitioner's rejection, at Sunland Park, New Mexico, of Respondent's application, as a horse trainer, for stall space at the Sunland Park racetrack for the racing season of 1973-1974.

Respondent's Pleadings Allege A Cause Of Action Arising In New Mexico

Respondent has alleged a cause of action arising in and entirely connected with the State of New Mexico. He alleged Petitioner is a New Mexico corporation, and that it owns and operates the Sunland Park

Racetrack at Sunland Park, New Mexico, and that it is a Licensee as that term is used in the New Mexico Laws and Rules and Regulations governing horse racing. He alleged that he is licensed by the Racing Commission of the State of New Mexico as a "trainer", which license in effect granted him the right to lawfully earn a living on Defendant's premises (the racetrack at Sunland Park, New Mexico); and that prior to 1972-1973 he had been granted a reasonable number of stalls [at Sunland Park, New Mexico], apparently in accordance with the Commission rules; that he requested 35 stalls for the 1972-1973 season, but was granted only 10, and alleged in that connection that a number of Respondent's horses were New Mexico "bred or foal"; and that he requested stall space for 32 horses for the 1973-1974 season, but was given no stalls, and in this connection alleged that a number of Plaintiff's horses were New Mexico "bred or foal"; that Defendant, as a "Licensee" is regulated by the rules of the New Mexico State Racing Commission, and that it has a duty not to be arbitrary or capricious in its actions toward Respondent. He alleged the New Mexico Racing Commission has a rule requiring Petitioner to give preference to a New Mexico "bred or foal" horse when allocating stall space, and Respondent further alleged that Petitioner violated said rule. He further alleged that he appealed by protest to the New Mexico State Racing Commission which held a hearing on it, but denied him any relief. A reference to these allegations of Plaintiff's First Amended Petition show that all of the acts and actions of which he complains on the part of Petitioner, and out of which Respondent's alleged cause of action arises, occurred and took place in the State of New Mexico, at Sunland Park Racetrack, and were in part alleged to be

violations by Petitioner of rules of the New Mexico State Racing Commission, and as a part of his cause of action further alleges an appeal by him to the New Mexico State Racing Commission which denied him any relief. The entire sequence of events occurred within the State of New Mexico, and the cause of action, if any there is, arose in that State. Respondent does not allege, as part of his cause of action, any act done by Petitioner in the State of Texas.

The Record Shows Respondent's Cause Of Action Arose In New Mexico

The record shows Petitioner is a New Mexico corporation, operating a racetrack at Sunland Park, New Mexico, near El Paso, Texas. As such it operated under the laws of the State of New Mexico and under the Rules and Regulations of the New Mexico Racing Commission. Respondent, as a trainer, had a license from the New Mexico Racing Commission, and after being denied stall space, as above stated, he appealed to the New Mexico Racing Commission, which denied his appeal. It thus appears that the cause of action which Respondent alleges to be a tort arose out of acts of Petitioner in the State of New Mexico, and did not arise, in whole or in part, out of any acts of Petitioner in Texas.

Petitioner has no permit to do business in Texas, has no office or place of business in Texas, no mail address in Texas, no telephone in Texas, no bank account in Texas, and has no agent for service in Texas. Petitioner mails out applications for stall space to persons it knows who may want them; after being filled out they are delivered to Petitioner at Sunland

Park, New Mexico, either by hand or by mail, and Petitioner accepts or rejects them at Sunland Park, New Mexico. None of the matters referred to occurred in Texas except the advertising.

Respondent relied mainly on the fact that among the horses running at Sunland Park, New Mexico are many "Texas" horses, and that he trained, in El Paso, Texas, the horses he raced at Sunland Park, although his pleadings refer only to his having New Mexico "bred or foal" horses; and he also urged the fact that Petitioner mails out stall applications and nomination applications for futurities and/or derbys to Texas residents, and that it advertises in El Paso, Texas, has a telephone listing in the El Paso Telephone Directory (for an Anapra, New Mexico telephone number), and that its President and its Racing Secretary maintain residences in El Paso, Texas, as showing it was doing business in Texas. Of these things, the only acts done by Petitioner in Texas is the advertising.

The Court Of Appeals Opinion Basically Holds The Location Of Petitioner's Sunland Park Racetrack Is New Mexico, But Near El Paso, Texas And Its Advertising In El Paso, Texas Confers Jurisdiction On Courts In Texas.

Service of process was made under the Texas "Long-Arm" Statute, Art. 2031b, *Tex. Rev. Civ. Stat.*, by serving the Secretary of State of the State of Texas. The District Court held it did not have jurisdiction, and dismissed the action.

On appeal, the United States Court of Appeals, Fifth Circuit, reversed, holding there was jurisdiction. It emphasized the location of Petitioner's Sunland Park Racetrack, that although located in New Mexico, it is near El Paso, Texas. For the first time in the jurisprudence of this nation an Appellate Court has held, in an action arising out of facts occurring in another state, that a nonresident foreign corporation is subject to the jurisdiction of courts of a state near which — but not in which — its business is located, basing such holding, in large part, on the proximity of the foreign corporations' place of business to a city in a nearby state.

The opening sentences of the opinion read:

> "Just because the eyes of Texas can see it, doesn't mean that the State's 'Long-Arm' process statute can reach it. However, location plays an important part in supporting personal jurisdiction in this tort action by an El Paso, Texas horse trainer against the operator of the adjacent Sunland Park race track in New Mexico."

Further on in the opinion it is said:

> "It cannot be attributed to accident that Sunland Park race track is nearer to El Paso, Texas than to any urban center in New Mexico."

And also,

> "Sunland is like an attractive cluster of mistletoe in a tree rooted in Texas soil.

> Though not attached to Texas, the mistletoe takes its nourishment from her earth. Without resort to the tort-in-Texas definition of doing business expressly provided for in Art. 2031b, Sec. 4, the proof showed that Fortuna was doing as much business in Texas as in New Mexico."

This last statement is not supported by the record, and is in fact not correct. Indeed, Petitioner does nothing in Texas except to advertise.

The Court of Appeals' likening Sunland Park racetrack to mistletoe on a tree rooted in Texas soil points up the error in its holding. Since Petitioner is a New Mexico corporation, supervised by the New Mexico Racing Commission, and with its racetrack and place of business in New Mexico, with no acts by it in Texas except its advertising here, it is obvious that factually the tree is rooted in New Mexico, and the advertising done in Texas is the mistletoe on the tree. The Court of Appeals, accordingly, and, using its own descriptive words, has held the New Mexico tree is in the jurisdiction of Texas-located courts if the mistletoe on the tree hangs over into Texas. This is an extension of the law on the subject which was warned against in *Hanson v. Denckla, supra.*

Nor is the Court of Appeals' statement correct that, "There is no precise Texas precedent, but we now decide that if Texas has to decide this case, it would hold it to be sufficient that the claim in the Complaint arose from Fortuna's general endeavors in Texas," for it is contrary to the requirements of Art. 2031b, Sec. 3, *Tex. Rev. Civ. Stat.*, and to the law as stated in *O'Brien*

v. Lanpar Co., (Tex. Sup.) 399 S.W.2d 340 (1966) and in *U-Anchor Advertising, Inc. v. Burt*, (Tex. Sup. 7-13-1977), ___ S.W.2d ___.

This holding, if permitted to stand, will permit a non-resident person or corporation doing business in one state to be sued in another state if it is located near the other state and advertises in it. This will be true, although it does no act in the other state except to advertise, such as by newspaper or television. Under this decision a nonresident in Texarkana, Arkansas may well be held to be within the jurisdiction of courts in Texarkana, Texas, even though the nonresident does nothing more than advertise in Texas. And the same could be true of a person or corporation in the District of Columbia advertising in Maryland or Virginia, or vice versa, being held to be within the jurisdiction of the courts in a state where it does nothing but advertise, provided it has a place of business in an adjacent state, located near the boundary line between them. The opinion of the Court of Appeals also refers, as a fact, to Petitioner's Sunland Park Racetrack being placed near El Paso, Texas so as to draw as its sustaining lifeblood citizens who are nurtured and protected by Texas; and also states the proof showed Fortuna was as much doing business in Texas as in New Mexico. The record does not support either of these statements. The assumption that the racetrack draws its lifeblood from El Paso, Texas is nowhere stated in the affidavits, deposition, or testimony at the hearing in the District Court. This racetrack, in fact, draws as well from Old Mexico, to which it is also adjacent, and also from New Mexico and other states. Sunland Park Racetrack is, in fact, adjacent to the celebrated "Pass of the North", through

which passed Spanish Conquistadores, Padres, soldiers and settlers en route from Mexico City to Santa Fe. After 1848 it also became an important point on the east-west route between Texas and points east on the one hand and California on the other hand. The net result was and is that the area adjacent to the Pass of the North has not only been affected and used by local citizens in Old Mexico, New Mexico and Texas, but has been affected and used by travelers and tourists from many states and countries. It is the same with the racetrack, for those who use it and those who are its patrons come from various states and countries.

REASONS WHY THE WRIT SHOULD BE GRANTED

In this diversity case the Court of Appeals not only has refused to follow the Texas law, but has also, in effect, extended the law as announced in the decisions of the Supreme Court of the United States so as to cover not only acts in the forum state, but also acts in an adjacent state as a basis for in personam jurisdiction. It has by its opinion in this case extended the rules, as stated in the decisions of this Court, to include as "minimum contacts" the fact that Petitioner's place of business in New Mexico is adjacent to El Paso, Texas, and it gave great weight to this fact. In the second sentence in the Court of Appeals' opinion it is said, ". . . location plays an important part in supporting personal jurisdiction in this tort action by an El Paso, Texas horse trainer against the operator of the adjacent Sunland Park racetrack in New Mexico." In Par. 3 of the opinion it said, "Fortuna's broad-based doing of its racetrack business in Texas through location, solicitation of customers, and dealing with Texas-

raised and -trained horses and trainers gave rise to the cause of action asserted here. Because it projected itself into Texas daily and because its very reason for being was to deal constantly and mostly with customers from the forum state, it is not appropriate to require that Wilkerson demonstrate some specific local act which created the cause of action." But of the things referred to, two of them, i.e., location and dealing with Texas-raised and -trained horses and trainers are all locations in or acts done by Petitioner in New Mexico. Only the solicitation of customers occurred in Texas. This is a tort case, and the cause of action arose in New Mexico. It is based upon Petitioner's failure to give Respondent stall space at its racetrack at Sunland Park, New Mexico. This is Petitioner's place of business, and it operated under a license from the New Mexico Racing Commission, and pursuant to the Commission's rules and regulations. Respondent, as a trainer, likewise held a license from the New Mexico Racing Commission, and was subject to its rules and regulations. His training horses in Texas, which he hoped to race in New Mexico (and on which the Court of Appeals partly based its holding) was not an act of Petitioner in Texas, but was unilateral activity on the part of Respondent, which does not satisfy the requirement of contact with the forum state. *Hanson v. Denckla*, 357 U.S. 235 at 253, 2 L. Ed.2d 1283 at 1297; *Sun-X International Co. v. Witt*, 413 S.W.2d 761 at 765. The decision of the Court of Appeals runs counter to *Hanson v. Denckla, supra*, and the statement in the opinion in that case, where, after referring to *Pennoyer v. Neff*, and *International Shoe Co. v. Washington*, it is said at p. 251 (p. 1296 in L.Ed.2d):

> "But it is a mistake to assume that this trend heralds the eventual demise of all restric-

> tions on the personal jurisdiction of state courts. See *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418, 1 L.Ed.2d 1456, 1459, 77 S. Ct. 1360. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that state that are a prerequisite to its exercise of power over him."

No more graphic description of what the Court of Appeals had can be found than in its own analogy as set out in its opinion, where it is said:

> "Sunland is like an attractive cluster of mistletoe in a tree rooted in Texas soil, though not attached to Texas, the mistletoe takes its nourishment from her earth . . . Sunland simply could not exist without an ordered society in El Paso."

The facts show however that the Court of Appeals has reversed the situation as to the soil in which the tree is rooted. Petitioner is a New Mexico corporation, its racetrack is situated in New Mexico, it is licensed by its office in New Mexico, the stalls for horses, out of which this controversy arose, are a part of the racetrack facility in New Mexico, and subject to the rules and regulations and regulations of the New Mexico Racing Commission, its acceptance or rejection of application for stall space was done at its office in

New Mexico. The Court of appeals in referring to "Fortuna's broad-based doing of its racetrack business in Texas" referred specifically and only to "location, solicitation of customers and dealing with Texas-raised and-trained horses and trainers." Of these, only the solicitation of customers occurred in Texas. It is apparent that this is a New Mexico tree rooted in the soil of New Mexico and that the mistletoe, if such it be, is the solicitation of customers, among other places, in Texas. It therefore seems clear that the Court of Appeals has held that a New Mexico tree on which the mistletoe (solicitation of customers) hangs over in Texas, is thereby subject to the jurisdiction of courts in the latter state. It has given great weight to the racetrack's location, which is in New Mexico, albeit near El Paso, Texas. This is an extension of the law on the subject which was warned against in *Hanson v. Denckla, supra*. By way of comparison, it will be noted that in *National Geographic Society v. California Board of Equalization*, ___ U.S. ___, 97 S.Ct. 1386, 50 L.Ed.2d 631 (1977) held that the Society's maintenance of two offices in California and activities there adequately established a relationship, or "nexus" between the Society and the state that renders constitutional the obligations imposed upon it pursuant to the California use tax. No office is maintained by Petitioner in Texas and accordingly there are no activities out of such office.

It therefore clearly appears that the Court of Appeals has gone far beyond the holdings of this Court, and contrary to the warning set out in *Hanson v. Denckla, supra*.

This is a diversity case, and the decision of the Court of Appeals is contrary to the requirements of the Texas "Long-Arm" Statute, and the decisions of the Texas Appellate Courts. Art. 2031b, *Tex. Rev. Civ. Stat.* makes the statute applicable to "any action, suit or proceedings arising out of such business done in this state." *O'Brien v. Lanpar Co.*, (Tex. Sup.) 399 S.W.2d 340 (1966) and *U-Anchor Advertising, Inc. v. Burt*, (Tex. Sup.) ___S.W.2d ___, 20 Tex. Sup. Ct. J. 435 (7-13-1977) state three basic elements must exist to sustain jurisdiction over a nonresident: (1) defendant must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) meet the due process requirements. The Court in the instant case held contrary to these requirements, stating that Petitioner's "broad-based" business in Texas through location [which is in New Mexico, not Texas], solicitation of customers, and dealing with Texas-raised and -trained horses [which dealings were in New Mexico, not Texas] gave rise to this cause of action. The decision patently is based upon actions by Petitioner in New Mexico, and not in Texas, contrary to the Texas statutes and decisions. In this diversity case this is an error on the important question of jurisdiction over a foreign corporation that should be corrected by this Honorable Court.

This Petition for a Writ of Certiorari therefore should be granted so that this Honorable Court can correct these errors on the part of the Court below.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

JAMES F. HULSE

Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petition has this date been served upon opposing counsel of record by placing same in the United States Mail, postage prepaid and properly addressed.

August ___, 1977.

JAMES F. HULSE

APPENDIX A

Eddie WILKERSON,
Plaintiff-Appellant,

v.

FORTUNA CORPORATION,
Defendant-Appellee.

No. 75-3306.

United States Court of Appeals, Fifth Circuit.

June 24, 1977.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, CLARK and RONEY, Circuit Judges.

CLARK, Circuit Judge:

Just because the eyes of Texas can see it, doesn't mean that the State's "long arm" process statute can reach it. However, location plays an important part in supporting personal jurisdiction in this tort action by an El Paso, Texas horse trainer against the operator of the adjacent Sunland Park race track in New Mexico. The district court erred in dismissing the action for lack of jurisdiction. We reverse and remand.

Eddie Wilkerson had been training horses in Texas for nine years when he filed the present action. Prior to 1972 he had applied for and received stalls at the Sunland Park race track for horses he trained.

Sunland Park is operated by the defendant, Fortuna Corporation. Wilkerson alleged that in 1972 he applied for 33 stalls at Sunland Park but was granted only ten stalls. In 1973 he avers he applied for 32 stalls and was given none. Wilkerson pled that Fortuna Corporation's refusal to deal was an arbitrary, capricious breach of its duty to him in violation of a rule of the New Mexico Racing Commission. Wilkerson further asserted that as a result of Fortuna's actions, he lost his training business.

Fortuna moved to dismiss on the ground that it was not amenable to substituted service of process under the Texas long arm statute. To support its motion it recited the usual defendant's litany for actions of this type. It has no offices, no business facilities, no bank account, and no agent in Texas and is neither licensed nor qualified to do business there. It is incorporated under the laws of New Mexico. Its sole business is the operation of Sunland Park race track, which is located in New Mexico and regulated by the New Mexico Racing Commission.

Fed.R.Civ.P. 4(e), which governs service of summons in this federal forum, provides:

> . . . Whenever a statute or rule of court of the state in which the district court is held provides for service of a summons . . . upon a party not an inhabitant of or found within the state, . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule.

The pertinent Texas long arm statute[1] deems any nonresident corporation which engages in business in the state to have appointed its Secretary of State as agent for process. It specially defines doing business in this language:

> For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company, association, partnership, or nonresident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State.

Tex.Rev.Civ.Stat. art. 2031b, § 4 (1964).

The district court's opinion stated:

> None of these activities [which were shown by the proof], in the court's view, rise to the level of an 'act' or 'transaction' by the foreign corporation, Fortuna Corporation, that gives rise to a cause of action for damages and none of these activities are sufficient to fulfill the requirement of 'minimum contact' with the State of Texas to warrant jurisdiction under the Texas long arm statute.

---

1 Tex.Rev.Civ.Stat. art. 2031b (1964).

Its reasoning was based on a line of Texas cases interpreting its long arm statute.[2] This three-part analysis was used: (1) The non-resident corporation must purposefully do some act or consummate some transaction in the forum state; (2) The cause of action must arise from or be connected with such act or transaction; and (3) the assumption of jurisdiction must not offend traditional notions of fair play and substantial justice considering activity in the state, relative convenience of the parties, benefits and protection of state law afforded the respective parties and basic equities.

Although Fortuna acknowledges that it engaged in much purposeful Texas activity, it asserts it was not doing business in Texas and that the district court correctly dismissed Wilkerson's asserted cause of action because it did not arise from any of those activities as required by Texas decisional law interpreting its long arm statute. This assertion is correct in its premise that the district court was controlled by forum state law as to the meaning and requirements of its statute. *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228, 1232 (5th Cir. 1973). Fortuna's alternative position is that even if it were amenable to process in this action under Texas standards, the federal due process concept of minimum contacts has not been met because (1) its activities did not meet the standard of "minimum contacts," and (2) the asserted cause of action did not arise from those contacts.

---

2 *O'Brien v. Lanpar Co.*, 399 S.W.2d 340 (Tex.Sup.Ct. 1966); *Hoppenfeld v. Crook*, 498 S.W.2d 52 (Tex.Civ.App. — Austin 1973, writ ref'd n. r. e.); *Sun-X Int'l Co., Inc. v. Witt*, 413 S.W.2d 761 (Tex. Civ.App. — Texarkana 1967, writ ref'd n. r. e.). *See also, Pizza Inn, Inc. v. Lumar*, 513 S.W.2d 251 (Tex.Civ.App. — Eastland 1974, writ ref'd n. r. e.)

I. *Jurisdiction Under Texas Law*

Our initial inquiry is as to whether Fortuna's activities constituted the doing of business in Texas within the meaning of its process statute. We find that the substantiality and continuity of its activities in Texas are of such nature and extent as would clearly meet the general Texas concepts of doing business.

It cannot be attributed to accident that Sunland Park race track is nearer to El Paso, Texas than to any urban center in New Mexico. It is so close, in fact, that in the course of the hearing the district judge stated, "I can see Sunland race track from the apartment where I live [in El Paso]." Obviously, it was placed conveniently by this metropolitan center so to draw as its sustaining life blood citizens who are nurture and protected by Texas. Its telephone number has a regular listing in the white pages of the El Paso telephone book and no toll charge is made for calls between these locations. Sunland Park purchases a listing in the yellow pages of the El Paso telephone directory. In the course of its operation of Sunland Park, Fortuna regularly solicits customers from El Paso to attend and gamble on its races. It performs this solicitation by advertising in two El Paso newspapers, on El Paso billboards, on El Paso radio and television stations, by distributing place mats to El Paso restaurants and bars, and by distributing discount admission cards to El Paso hotels, motels and other public gathering places. The expenditures made for such promotional solicitations were classified as substantial by Fortuna's president, who maintains a place to live in El Paso. The track's racing secretary, who also maintains his abode in El Paso, regularly

mailed stall applications to Texas residents and mailed such an application to Wilkerson for the years involved. By mail, telephone, or personal contact, the racing secretary solicited entries for races to be held at Sunland Park from Texas residents and mailed futurity and derby nominations for Sunland Park special races to Texas residents. On almost any racing day, more horses entered in races at Sunland Park are bred or foaled in Texas than any other state, including New Mexico.

The ultimate business of a race track is to exhibit races to patrons who will pay to attend and gamble on their outcome. Texas does not allow parimutuel horse-racing, so Sunland Park race track was set up as close to its Texas patrons as the racing and gambling laws of New Mexico would allow — just across the state line. It saturated El Paso with its substantial advertising activity to attract Texans a short step across that line. It also drew a large share of its racing horses from Texas. In summary, Sunland was designed and operated as a two-state venture. New Mexico gave the location and concomitant authorization of gambling and horse racing, an imprimatur unavailable in Texas. Texas and its citizens provided the necessary patronage and revenues and many of Sunland's race horses. Sunland is like an attractive cluster of mistletoe in a tree rooted in Texas soil. Though not attached to Texas, the mistletoe takes its nourishment from her earth. Without resort to the tort-in-Texas definition of doing business expressly provided in Article 2031b, § 4, the proof showed that Fortuna was as much doing business in Texas as it was in New Mexico. *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974); *Hull v. Gamblin*, 241 A.2d 739

(D.C.App.1968) (applying Texas long arm statute); 4 C. Wright & A. Miller, Federal Practice & Procedure, § 1069 at 253-55.

Sunland simply could not exist without an ordered society in El Paso. Even Fortuna's advertising efforts would be ineffectual without the regular function of municipal government there. These substantial Texas activities suffice to form a solid basis of purposeful action and thereby satisfy the first of the Texas law three-part analysis. The second is met as well. It requires that the cause of action arise from, or be connected with, the defendant's Texas activities. In Fortuna's instance, Texas courts would not have to utilize the long arm statute's thin fiction of a single tort or single contract as the basis of appointment of the Secretary of State for substituted service of process. Fortuna's broad-based doing of its race track business in Texas through location, solicitation of customers, and dealing with Texas-raised and -trained horses and trainers gave rise to the cause of action asserted here. Because it projected itself into Texas daily and because its very reason for being was to deal constantly and mostly with customers from the forum state, it is not appropriate to require that Wilkerson demonstrate some specific local act which created the cause of action. There is no precise Texas precedent, but we now decide that if Texas has to decide this case, it would hold it to be sufficient that the claim in the complaint arose from Fortuna's general endeavors in Texas.

An additional state law point remains to be considered. Texas requires that the assumption of jurisdiction must not offend traditional notions of fair

play. This analysis considers activity in the state, relative convenience of the parties, benefits and protection of state law extended to the non-resident, and basic equities. These factors have been discussed in some detail above, and that discussion is apropos here. Fortuna placed its facing enterprise as close to El Paso as it conveniently could so it could earn money from patrons who lived, worked, and visited there. It availed itself of Texas businesses, newspapers, radio and television stations, and other media to attract Texans to its race track. As we have also observed, the tort allegedly committed caused damage in Texas to one of her residents. El Paso is the site of the United States District Court closest to Fortuna's place of business. Her president and the official who allegedly committed the tort both live in El Paso. No traditional notion of fair play is offended by requiring Fortuna to defend this suit in Texas. Because Fortuna has availed itself of the benefits and protection of Texas law extended to itself, its patrons and performers, the basic equities favor the maintenance of jurisdiction in the El Paso District Court.

II. *Federal Due Process*

Finally, we must give attention to Fortuna's secondary position that the maintenance of jurisdiction here will offend federal due process. Fortuna's contention has two parts. The first is that the contacts were insufficient to meet minimum standards. This has been completely discussed above as to a general doing of business. Our court has also approved the special statutory definition covering a single tort. *Jetco Electronic Industries, Inc. v. Gardiner, supra; see also Product Promotions, Inc. v. Cousteau, supra.* The sec-

ond is whether the cause of action asserted must arise from Fortuna's contacts with Texas. The factual answer to this second point has also been set out above in the course of discussing both the broad and the narrow state law standards for doing business. The Supreme Court has recently supplied a legal answer as well. In *National Geographic Society v. California Board of Equalization,* ___ U.S. ___, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977), the Court held a District of Columbia non-profit corporation liable for collection of California use tax on mail-order sales made from the District of Columbia. The ruling was bottomed on the concept of doing business in California. The business done by the Society consisted of the maintenance of two offices which did nothing but solicit advertising for the Society's magazine. They played no part whatsoever in mail-order sales. The Court expressly rejected the claim that federal constitutional due process required a connection between the California activity and the matter regulatable by California statute. The Court stated:

> [T]he relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate "some definite link, some minimum connection, between [the State and] the person . . . it seeks to tax." *Miller Bros. v. Maryland, supra,* 347 U.S. 340, at 344-345, 74 S.Ct. 535, at 539, 98 L.Ed. 744. (Emphasis added.) Here the Society's wo offices, without regard to the nature of their activities, had the

> advantage of the same municipal services — fire and police protection, and the like — as they would have had if their activities . . . included assistance to the mail order operations that generated the use taxes.

Id. at ____, 97 S.Ct. at 1393. The *National Geographic* holding that federal due process is not offended when a state imposes a use tax that is unrelated to the activities of the non-resident within the state is applicable here. If a "minimum connection" is all that need be shown to exert the state's power to tax, a *fortiori*, a non-resident may be required to defend an action in state court even though the suit bears no relation to the activities deemed necessary and sufficient to constitute minimum contacts. It is more than enough to satisfy federal constitutional due process, in the case at bar, to establish that Fortuna's fortunes were continuously and intimately linked with El Paso.

National Geographic confirms the conclusions reached by this circuit in *Jetco Electronic Industries, Inc. v. Gardiner, supra*. The Texas long arm statute was held properly to embrace a defendant who committed a tort in the state, since "the defendant's other activities within the forum, even though wholly unrelated to the suit, satisfy the minimum contacts requirement." *Id.*, 473 F.2d at 1234. *See also* 4 C. Wright & A. Miller, *supra*, § 1069 at 261.

The judgment dismissing the action for lack of personal jurisdiction is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3306

EDDIE WILKERSON,
Plaintiff-Appellant,

versus

FORTUNA CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

---

ON PETITION FOR REHEARING
(July 26, 1977)

Before WISDOM, CLARK and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ CHARLES CLARK
United States Circuit Judge

[Filed: Jul. 26, 1977]

APPENDIX C

Art. 2031b. Service of process upon foreign corporations and nonresidents

Failure to appoint agent; designation of Secretary of State as lawful attorney

Section 1. When any foreign corporation, association, joint stock company, partnership, or non-resident natural person required by any Statute of this State to designate or maintain a resident agent, or any such corporation, association, joint stock company, partnership, or non-resident natural person subject to Section 3 of this Act, has not appointed or maintained a designated agent, upon whom service of process can be made, or has one or more resident agents and two (2) unsuccessful attempts have been made on different business days to serve process upon each of its designated agents, such corporation, association, joint stock company, partnership, or non-resident natural person shall be conclusively presumed to have designated the Secretary of State of Texas as their true and lawful attorney upon whom service of process or complaint may be made.

Engaging in business in state; service upon person in charge of business

Sec. 2. When any foreign corporation, association, joint stock company, partnership, or non-resident natural person, though not required by any Statute of this State to designate or maintain an agent, shall engage in business in this State, in any action in which such corporation, joint stock company, association, partnership, or non-resident natural person is a party or is to be made a party arising out of such business, service may be made by serving a copy of the process with the person who, at the time of the service, is in charge of any business in which the defendant or defendants are engaged in this State, provided a copy of such process, together with notice of such service upon such person in charge of such business shall forthwith be sent to the defendant or to the defendants principal place of business by registered mail, return receipt requested.

Act of engaging in business in state as equivalent to appointment of Secretary of State as agent

Sec. 3. Any foreign corporation, association, joint stock company, partnership, or non-resident natural person that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent

to an appointment by such foreign corporation, joint stock company, association, partnership, or non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation, joint stock company, association, partnership, or non-resident natural person is a party or is to be made a party.

Doing business in state; definition

Sec. 4. For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company, association, partnership, or non-resident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State.

Delivery of process to Secretary of State; forwarding copy

Sec. 5. Whenever process against a foreign corporation, joint stock company, association, partnership, or non-resident natural person is made by delivering to the Secretary of State duplicate copies of such process, the Secretary of State shall require a statement of the name and address of the home or home office of the non-resident. Upon receipt of such process, the Secretary of State shall forthwith forward to the defendant a copy of the process by registered mail, return receipt requested.

Non-residency after accrual of cause of action; service upon Secretary of State

Sec. 6. When any corporation, association, joint stock company, partnership or natural person becomes a non-resident of Texas, as that term is commonly used, after a cause of action shall arise in this State, but prior to the time the cause of action is matured by suit in a court of competent jurisdiction in this State, when such corporation, association, joint stock company, partnership or natural person is not required to appoint a service agent in this State, such corporation, association, joint stock company, partnership or natural person may be served with citation by serving a copy of the process upon the Secretary of State of Texas, who shall be conclusively presumed to be the true and lawful attorney to receive service of process; provided that the Secretary of State shall forward a copy of such service to the person in charge of such business or an officer of such company, or to such natural person by certified or registered mail, return receipt requested.

Cumulative effect of act

Sec. 7. Nothing herein contained shall be construed as repealing any statute in force in this State in reference to service of process, but this Act shall be cumulative of all existing statutes. Acts 1959, 56th Leg., p. 85, ch. 43.

APPENDIX D

U-ANCHOR ADVERTISING, INC.
v.
N. H. BURT, d/b/a Granot Lodge

No. B-6516

From Potter County, Seventh District.

Writ of error granted April 20, 1977. (20 Tex. Sup. Ct. Jour. 277) (Opinion of CCA, 544 S. W. 2d 500).

Judgments of the courts below are affirmed. (Opinion by Justice Steakley.)

For Petitioner: Hal Miner, Amarillo, Texas.

For Respondent: Kenneth . Back, Amarillo, Texas.

This is a suit for breach of contract. It was instituted in the 47th District Court of Potter County, Texas by U-Anchor Advertising, Inc., Petitioner, against N. H. Burt, doing business as Granot Lodge, Respondent. U-Anchor is a Texas corporation domiciled in Amarillo, Potter County, Texas. Burt is a resident of Clinton, Custer County, Oklahoma. Citation was served upon the Secretary of State of Texas as the presumed agent of Burt for service of process pursuant to Article 2031b, TEX. REV. CIV. STAT. ANN., the Texas "long-arm" statute. Burt entered a special appearance to contest the jurisdiction of the Texas court pursuant to Rule 120a of the Texas Rules of Civil Procedure. The trial court sustained Burt's Motion to the Juris-

diction, and this was affirmed by the Court of Civil Appeals. It was the view of the court that while Burt was unquestionably doing business in Texas within the terms of Article 2031b, his contacts with Texas fell short of the requirements of due process. 544 S. W. 2d 500. We affirm the judgment of the Court of Civil Appeals.

Certain additional facts bearing upon the question of jurisdiction appear undisputed. The written contract upon which suit was brought was executed by the parties in Clinton, Oklahoma. It resulted from solicitation by a salesman for U-Anchor who signed the contract for U-Anchor. The contract called for U-Anchor to place five advertising displays for Burt at various Oklahoma highway locations for a period of 36 months. Burt agreed to pay U-Anchor $80 monthly at its office in Amarillo, Potter County, Texas. U-Anchor constructed the signs in Amarillo and erected them at the Oklahoma locations. Burt mailed six and perhaps seven monthly payment checks to U-Anchor at its office in Amarillo, but he had no other contacts with Texas.

The controlling provisions of Sections 3 and 4 of Article 2031b are as follows:

Sec. 3. *Any . . . non-resident natural person that engages in business in this State*, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this

State shall be deemed equivalent to an appointment by such . . . non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such . . . non-resident natural person is a party or is to be made a party.

Sec. 4. For the purpose of this Act, *and without including other acts that may constitute doing business*, any . . . non-resident natural person shall be deemed doing business in this State *by entering into contracts* by mail or otherwise *with a resident of Texas to be performed in whole or in part by either party in this State*, . . . (Italics are added for emphasis).

Article 2031b provides that a non-resident entering into a contract with a Texas resident performable in part by either party in Texas shall be deemed to be doing business in Texas. The contract in question obligated Burt to perform his payment obligations at the office of U-Anchor in Amarillo, Texas, and thus he was "doing business" in Texas within the meaning of the statute. We agree that in this respect, as well as with respect to "other acts that may constitute doing business," Article 2031b reaches as far as the federal constitutional requirements of due process will permit. We let stand the statement in *Hoppenfeld v. Crook*, 498 S. W. 2d 52 (Tex. Civ. App. — Austin 1973, writ ref'd n.r.e.) "that the reach of Art. 2031b is limited only by the United States Constitution." See also *National Truckers Service, Inc. v. Aero Systems, Inc.*, 480 S. W. 2d 455 (Tex. Civ. App. — Fort Worth 1972, writ

ref'd n.r.e.).[1] The federal courts have similarly construed Article 2031b. *See Product Promotions, Inc. v. Cousteau*, 495 F. 2d 483 (5th Cir. 1974), and the cases there cited. Furthermore, such a construction is desirable in that it allows the courts to focus on the constitutional limitations of due process rather than to engage in technical and abstruse attempts to consistently define "doing business." *See* Thode, *In Personam Jurisdiction; Article 2031b, the Texas "Long Arm" Jurisdiction Statute; and the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 TEX. L. REV. 279, 307 (1964).

The question, then, becomes one of due process. In *Cousteau, supra*, the Fifth Circuit concluded that the relevant federal decisions established a dual test for determining whether a court may exercise its jurisdiction without depriving a non-resident defendant of due process of law: "First, 'there must be some minimum contact with the state which results from an affirmative act of the defendant.' Secondly, 'it must be fair and reasonable to require the defendant to come into the state and defend the action.' " *Cousteau, supra*, at 494. *See also Jetco Electronic Industries, Inc. v. Gardiner*, 473 F. 2d 1228 (5th Cir. 1973); 2 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 4.25 [5] (1975). In *O'Brien v. Lanpar Company*, 399 S. W. 2d 340 (Tex.

---

1 It may be noted that in 1975 Rule 108 of the Texas Rules of Civil Procedure was amended to add the words shown in italics:

> A defendant served with such notice shall be required to appear and answer in the same manner and time and under the same penalty as if he had been personally served with citation within the State *to the full extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam.*

We stated that the purpose of the amendment is to permit acquisition of in personam jurisdiction to the constitutional limits.

1966), this Court recognized the following statement of the three basic elements that must exist to sustain jurisdiction over a non-resident:

> (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

See Tyee Construction Co. v. Dulien Steel Products, Inc., 62 Wash. 2d 106, 381 P. 2d 245 (1963). It is evident that U-Anchor's cause of action against Burt is connected with the contractual obligation assumed by Burt and partially performable in Texas. However, Burt must also have purposefully done some act or consummated some transaction in Texas, and the assumption of jurisdiction by the Texas courts must be found not to offend traditional notions of fair play and substantial justice.

In *Hanson v. Denckla*, 357 U.S. 235 (1958), the Supreme Court admonished that it would be "a mistake" to assume that the liberal due process standard enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), "heralds the eventual demise of all

restrictions on the personal jurisdiction of state courts." *Hanson, supra*, at 251. Explaining the requirements of due process, the Court continued:

> The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but *it is essential in each case that there by some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.* [Emphasis added].

Id. at 253. *See Shaffer v. Heitner*, 45 U.S.L.W. 4849, 4857 (U.S. June 24, 1977). In the instant case the contacts of Burt with Texas are minimal and fortuitous, and he cannot be said to have "purposefully" conducted activities within the State. Burt's contacts with Texas were not grounded on any expectation or necessity of invoking the benefits and protections of Texas law, nor were they designed to result in profit from a business transaction undertaken in Texas. The contract was solicited, negotiated, and consummated in Oklahoma, and Burt did nothing to indicate or to support an inference of any purpose to exercise the privilege of doing business in Texas. Simply stated, Burt was a passive customer of a Texas corporation who neither sought, initiated, nor profited from his single and fortuitous contact with Texas.

Furthermore, in the instant case the exercise of jurisdiction by Texas courts would offend traditional

notions of fair play and substantial justice. As noted above, the only contact of Burt with Texas consisted of his execution of a contract stipulating that certain payments were to be made in Amarillo and his remittance of several payments to U-Anchor in Amarillo. Thus the quality, nature, and extent of Burt's activity in Texas is minimal. Indeed, it can be said that Burt has engaged in no "activity" in Texas, his only "activity" being the preparation and mailing of checks from his place of business in Oklahoma. Resolution of the question of the relative convenience of the parties results in a stalemate since it is no doubt more convenient to each party to litigate in his home state. However, since the contract was solicited, negotiated, and consummated in Oklahoma, Burt might reasonably expect its enforcement to be governed by Oklahoma law. Considering the basic equities and circumstances of the case, we hold that Burt would not be accorded due process of law if required to defend the suit of U-Anchor in Texas. *See Hoppenfeld v. Crook, supra; Sun-X International Company v. Witt,* 413 S. W. 2d 761 (Tex. Civ. App. — Texarkana 1967, writ ref'd n.r.e.).

Numerous decisions of the Texas courts of civil appeals hold that on the facts there presented the nonresident defendant would not be denied due process by being subjected to suit in Texas. With one exception, those cases are distinguishable on their facts. For example, in *National Truckers Service, Inc. v. Aero Systems, Inc.,* 480 S. W. 2d 455 (Tex. Civ. App. — Fort Worth 1972, writ ref'd n.r.e.), the defendant had been doing business in Texas through its subsidiary, Transystems, Inc. When the subsidiary became delinquent on its accounts, Aero agreed to guarantee the debts of

Transystems, executed a guaranty agreement, and mailed it to National Truckers Service in Fort Worth. In reliance on this guaranty agreement, National Truckers continued to extend credit to Transystems. The guaranty agreement provided that payment would be made in Fort Worth and that the guaranty itself was performable at Fort Worth. Subsequently Transystems became delinquent on its accounts, and National Truckers filed suit in Texas to enforce the guaranty agreement. The Court of Civil Appeals held the contacts of Aero with Texas were sufficient to justify the assertion of in personam jurisdiction by the Texas courts, and we found no reversible error in that holding. Of significance in that case was the fact that Aero voluntarily and purposefully agreed to guarantee the Texas debts of its Texas subsidiary. Aero should reasonably have expected to face suit in the Texas courts in the event its subsidiary defaulted on its obligations.

In *Uvalde Rock Asphalt Company v. Consolidated Carpet Corporation,* 457 S. W. 2d 649 (Tex. Civ. App. — Beaumont 1970, writ ref'd n.r.e.), the contract forming the basis of the business relationship was solicited in Arizona by a Texas manufacturer. All debts were payable in San Antonio, Texas. Pursuant to the contract, the Arizona wholesaler placed several orders with the Texas manufacturer. The goods were delivered F.O.B. Houston, and on some orders the Arizona wholesaler requested delivery to Texas retailers. The Court of Civil Appeals concluded that the activity of the Arizona wholesaler was calculated to extract profits from markets in Texas. This factor, coupled with the additional contacts enumerated above, was sufficient to supply the "minimum contacts" demanded by due process.

Estes Packing Company v. Kadish and Milman Beef Co., 530 S. W. 2d 622 (Tex. Civ. App. — Fort Worth 1975, no writ), did not reach this Court. In that case a Chicago broker ordered beef from a Fort Worth packing company and resold it to a Massachusetts corporation. The broker sent both parties written confirmations of sale giving shipping instructions stating the beef was to be delivered by truck to the defendant's plant in Boston. The shipper was an independent contractor unrelated to either the Texas seller or the Boston buyer. The shipment was accompanied by an invoice stating the meat was offered for sale at the prices quoted on the invoice. The invoice also provided "All Bills Payable in Fort Worth." Kadish sent a check to Estes covering a portion of the shipment and noted on the back of the check that it was in full payment of all debts of Kadish to Estes. Estes refused to accept the check with that notation and subsequently filed suit. The Court of Civil Appeals concluded that these facts established the existence of a contract between Kadish and Estes. Further, the court held that due process would not be violated by the exercise of jurisdiction over Kadish even though Kadish's only contact with Texas was the remittance of one check to the Texas seller. This holding conflicts with our holding in the instant case and is disapproved.

The facts of this case bring it within the literal reach of Art. 2031b, but, as detailed above, the due process clause of the Fourteenth Amendment prohibits Texas courts from exercising jurisdiction over Burt in a suit arising out of his contract with U-Anchor. The nature and extent of the contacts of a non-resident with the forum state determine whether or not the forum may exercise in personam jurisdiction over the non-

resident, but the infinite variety of such contacts and the vagueness of the constitutional standard render a more definitive articulation of due process requirements impossible. As noted in *Cousteau, supra*, no one formulation of the constitutional test could possibly encompass all the potentially important factors, nor could a formula perform the crucial task of weighing and balancing the relevant considerations. Narrow factual distinctions will often suffice to swing the due process pendulum. Here, as elsewhere, important constitutional questions prove immune to solution by checklist. *See* Annot., 20 A.L.R. 3rd 1201 (1968); Thode, supra; Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts — From Penoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958); Comment, *The Texas Long-Arm Statute, Article 2031b: A New Process Is Due*, 30 SW. L. J. 747 (1976); Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 U. MICH. L. REV. 300 (1970); Note, 34 U. LA. L. REV. 691 (1974).

The judgment of the Court of Civil Appeals is affirmed.

ZOLLIE STEAKLEY
Justice

Opinion delivered July 13, 1977.

Supreme Court, U. S.
FILED
OCT 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-398

FORTUNA CORPORATION,

Petitioner,

vs.

EDDIE WILKERSON,

Respondent

On Response to Petition For A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

VICTOR K. SIZEMORE
Attorney for Respondent
SIZEMORE AND HARRIS
4849 North Mesa, Suite 311
El Paso, Texas 79912

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-398

FORTUNA CORPORATION,

Petitioner,

vs.

EDDIE WILKERSON,

Respondent

On Response to Petition For A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

VICTOR K. SIZEMORE
Attorney for Respondent
SIZEMORE AND HARRIS
4849 North Mesa, Suite 311
El Paso, Texas 79912

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
ARGUMENT AND AUTHORITIES FOR NOT GRANTING THE WRIT	4
CONCLUSION	8
CERTIFICATE OF SERVICE	9

LIST OF AUTHORITIES

Cases

	Page
National Geographic Society v. California Board of Equalization, _____ U.S. _____, 97 S.Ct. 1386, 50 L. Ed. 2d, 631, (1977)	5,8
Wilkerson v. Fortuna Corporation, 554 F2d 745 (5th Cir. 1977);	2

Rules

Rule 12, Federal Rules of Civil Procedure	1
Rule 4(e), Federal Rules of Civil Procedure	4
Rule 19.1 (b) Rules of the Supreme Court of the United States	4,5

Statutes

Vernon's Annotated Texas Civil Statutes Article 2031 (b)	4

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1977

No. 77-398

FORTUNA CORPORATION,

Petitioner,

vs.

EDDIE WILKERSON,

Respondent.

On Response to Petition For A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

STATEMENT OF THE CASE

This Petition for Writ of Certiorari originated from the United States District Court for the Western District of Texas, El Paso Division, in which the Court granted the Petitioner's Motion to Dismiss for lack of jurisdiction over the Petitioner, after a hearing pursuant to Rule 12 of the Federal Rules of Civil Procedure on April 23, 1975 (R. 57). Thereafter, the Respondent filed a Motion for New Trial or to alter or amend the judgment along with the proposed findings of fact and conclusions of law (R. 58). On June 25, 1975, the District Court entered an Order denying Respondent's Motion (R. 75). Respondent filed timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on July 24, 1975 (R. 76). After oral argument, the United States Court of Appeals on June 24, 1977 reversed and remanded the case to the District Court for further proceedings not inconsistent with Cause number 75-3306; Wilkerson v. Fortuna Corporation, 554 F2d 745 (5th Cir. 1977); said opinion further appearing as Appendix "A". On July 26, 1977, Petitioner's Petition for rehearing before the United States Court of Appeals for the Fifth Circuit was denied, a copy of said Order appearing as Appendix "B".

Respondent, Eddie Wilkerson, is a resident of El Paso County, Texas, and has his principal place of business as a "trainer" of horses in said County (TR8). The Petitioner, Fortuna Corporation, is a corporation organized under the laws of the State of New Mexico, which owns and operates, inter alia, a business known as "Sunland Park Race Track" located at Sunland Park, New Mexico (R. 30,31,32).

The Respondent, prior to August 25, 1972 and that year's horse racing "season" formally requested "stall space" at Sunland Park Race Track for several horses. Stall space on the race track grounds is a necessary pre-requisite for horses to compete in various races which occur during a particular "season". Again, prior to the racing season for the year 1973,

Respondent formally requested stall space. Notwithstanding the respective request by Respondent for the respective years' horse racing seasons, the Petitioner first reduced the number of stall spaces requested in 1972 and thereafter completely disallowed any stall space in 1973 (TR 9-16).

The Respondent received and filed his applications for stall space at the race track through the mail (TR 12, 13; R 35). Further, the Respondent testified at the hearing, and this was corroborated by the Petitioner's President, that the Respondent received the rejections for his stall applications through the mail (TR 15; R 35). The Petitioner's President further stated that it is customary practice for the Petitioner, Fortuna Corporation, to mail stall applications and/or futurity and derby nomination applications to Texas residents (R. 36). The Petitioner's President stated, in his answers to written interrogatories, that stall applications were mailed to Texas residents during the calendar year 1973; and that Sunland Park Race Track, through its racing Secretary or other persons, solicited entries for races to be held in the fall of 1973 from Texas residents in the State of Texas by telephone, mail or personal contact (R. 35).

The pleadings filed by Respondent in the District Court, reflect clearly that the Respondent's theory of recovery in this lawsuit are based upon both contract and tort. Therefore, for Respondent to have obtained jurisdiction over the Petitioner in the United States District Court of Texas, Respondent relied upon Rule 4 (e) of the Federal Rules of Civil Procedure

which provides that "the Court may employ the applicable and 'long arm statute' of the State in which it sits". The Texas long arm statute, Article 2031 (b), has been set forth in its entirety in Appendix "C".

ARGUMENT AND AUTHORITIES FOR NOT GRANTING THE WRIT

Petitioner, sets forth in his jurisdictional statement of his Petition for a Writ of Certiorari as a basis for this Court granting the writ Title 28, United States Code, Section 1254 (1) and Rule 19.1 (b) of the Rules of the Supreme Court of the United States. Title 28, United States Code, Section 1254, simply sets forth the statutory authority by which cases in the Courts of Appeals may be reviewed by the Supreme Court of the United States if a Writ of Certiorari is granted upon the Petition of any party to any civil or criminal case.

As this Court is well aware upon the review of any petition for a Writ of Certiorari, Rule 19.1 states:

> "a review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore". (Emphasis supplied)

Petitioner has relied upon Rule 19 (b) for the jurisdictional reasons that this Court should grant the Petition. The Respondent would submit that there is not one criterion set forth in Rule 19 (b) of the Supreme Court Rules which would form a basis for granting Petitioner's writ employing the "sound judicial discretion test". The decision of the United States Court of Appeals for the Fifth Circuit reversing and remanding this case to the District Court is not a decision which is in conflict with another Court of Appeals on the same matter; it is not a decision which decides an important State or Territorial question in a way in conflict with applicable State or Territorial law; it is not a decision which decides an important question of Federal Law which has not been, but should be settled by this Court; or has the Fifth Circuit Court of Appeals decided a Federal question in a way in conflict with the applicable decisions of this court as Petitioner alludes to on Page 6 of his Petition citing National Geographic Society v. California Board of Equalization, _____ U.S. _____, 97 S. Ct. 1386, 50 L. Ed. 2d, 631 (1977); or has the decision rendered by the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Honorable Court's power of supervision.

Therefore, all of Petitioner's arguments for granting this Writ under Rule 19. 1 (b) of the Supreme Court Rules, are obviously without merit, and Respondent submits that the decision of the Court of Appeals and its application of the law to

the facts clearly supports it's position.

The only reason Respondent has elected to file this Brief in opposition to the Petition for a Writ of Certiorari is due to the Petitioner's distortion and misinterpretation of the record concerning the characterization of the Respondent's lawsuit. Therefore, Respondent has been compelled to re-state the facts and law, which are clearly supported by the record.

The Petitioner in Pages 9-12 of his Petition, relies heavily upon three criterion for this Court granting his Writ of Certiorari. First, that Respondent's pleadings allege a cause of action arising in New Mexico; second, that the record shows Respondent's cause of action arose in New Mexico; and last, that the Court of Appeals opinion basically holds the location of Petitioner Sunland Park Race Track is New Mexico, but near El Paso, Texas and its advertising in El Paso, Texas confers jurisdiction on Courts in Texas. None of these propositions are supported by the facts or the law. Conveniently, Petitioner has left out a considerable part of the Fifth Circuit's opinion which is totally supported by the record. In support of this statement, the Respondent would set forth the following facts which are more than sufficient to establish "minimum contacts with Texas" thereby conferring jurisdiction under Texas law over the Petitioner:

The Petitioner, Fortuna Corporation, maintains a telephone number and listing in the El Paso Telephone Directory, listed under "Tracks" (TR 16). The Petitioner, directly or indirectly, distributes

discount admission cards to hotels, motels, and other locations in El Paso, Texas, entitling the holder of such cards to discount admission to the Sunland Park Race Track (R 37). The Petitioner, through its President, admits to placing advertisements for Sunland Park Race Track in the El Paso Times or the El Paso Herald Post, which are El Paso newspapers (R 37). The Petitioner admits and it is confirmed by the Respondent's testimony that the Petitioner does extensive advertising on billboards, radio and television in the El Paso area (TR 16; R 37). The President of Petitioner's corporation, stated in cross-interrogatories that the total money spent for advertising in the calendar year 1973 for place mats, discounted admission cards, newspaper, radio and television is substantial (R 37). The Petitioner's President further stated that the race track purchases food for the race track from distributors located in the State of Texas (R 38). The race track employs personel who reside in the State of Texas and its officers and agents live in El Paso County, Texas (R 38, 39). The evidence further is undisputed that the Petitioner corporation has held luncheons in El Paso, Texas; holds a race known as the "West Texas Futurity"; and that on any given racing day there are more Texas horses (meaning Texas "bred and foal" horses) on the racing program than any other State in the Union (TR 18, 19).

Based upon all of the above recited facts the Respondent would refer this Honorable Court to the reasoning of the Court of Appeals conferring jurisdiction under Texas law over the Petitioner

corporation at Pages 5a, 6a, 7a and 8a, of the Appendix "A".

In response to any possible argument by Petitioner regarding the denial of any "Federal Due Process" as a basis for this Court granting his Petition the Respondent would submit that this has heretofore been answered by the Fifth Circuit on Pages 8a, 9a and 10a, citing National Geographic Society v. California Board of Equilizations, _____ U.S. _____, 97 S.Ct. 1386, 51 L. Ed. 2d, 631 (1977).

Perhaps, the Fifth Circuit has already best summarized your Respondent's position to any possible Federal Due Process contentions being in conflict with applicable decisions of this Court wherein at Page 10a of the Appendix it is stated:

> "It is more than enough to satisfy Federal Constitutional Due Process, in the case at bar, to establish that Fortuna's fortunes were continuously and intimately linked with El Paso."

CONCLUSION

Since Petitioner has failed to set forth one single criteria under Rule 19.1 (b) giving this Court a basis for granting his Petition for a Writ of Certiorari, the Respondent prays that his Petition be in all things denied.

Respectfully submitted,

VICTOR K. SIZEMORE
SIZEMORE AND HARRIS
Attorneys for Respondent
4849 N. Mesa, Suite 311
El Paso, Texas 79903

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief in Opposition to the Petition for Writ of Certiorari filed herein has this date been served upon Mr. James F. Hulse, Scott, Hulse, Marshall and Feuille, 11th Floor, El Paso National Bank Building, El Paso, Texas 79901, Attorneys for Petitioner.

DATED October 12th, 1977.

VICTOR K. SIZEMORE